Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1430

KURT R. STRAUBE, M.D.,

Petitioner,

v.

EMANUEL LUTHERAN CHARITY BOARD,
a corporation, dba EMANUEL HOSPITAL,

Respondent.

RESPONSE TO THE PETITION FOR A
WRIT OF CERTIORARI TO
THE OREGON SUPREME COURT

See Inside Cover for Counsel

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Response to Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Straube v. Larson, et al, No. 75-1795

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Respondent Emanuel Lutheran Charity Board (Emanuel) respectfully urges the court to deny petitioner's request for writ of certiorari in this proceeding.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reflects the allegations of his complaint upon which the opinions below were based and the procedural history of this litigation.

ARGUMENT

1. The Supreme Court has twice declined review of the issue presented in this case.

Two Petitions for Certiorari dealing with the issue presented in this case have previously been denied by the Supreme Court. One of these, Straube v. Larson, et al, 74-3496, 74-3497, (9th Cir 1976), petition for certiorari denied, 429 US 830, 97 S Ct 91, 50 L

Ed 94, 1976, was based on the same facts as this case. The other, which petitioner himself admitted dealt with the same issue as the present case, was Greco v. Orange Memorial Hospital Corporation, 423 US 1000, 96 S Ct 433, 46 L Ed 2d 376 (1975). (Petition at 18) No significant developments have occurred since the court denied these petitions.

2. A private non-profit hospital is not subject to the due process requirements of the Fourteenth Amendment to the United States Constitution.

The issue of whether a private non-profit hospital is subject to due process requirements has already been fully briefed in the petition for writ of certiorari and the response to petition filed in the federal court case based on the same facts as this case. Straube v. Larson, et al, 74-3496, 74-3497, (9th Cir 1976), petition for certiorari denied, 429

US 830, 97 S Ct 91, 50 L Ed 94, 1976. Respondent will rely primarily on the arguments made in response to the petition in that case which is attached as Appendix "A". See, also, the opinion of the District Court in that case attached to petition as Appendix "C".

An analysis of all cases cited in the earlier Petition for Certiorari revealed that only the Fourth Circuit was consistently holding that the acts of private hospitals are state actions requiring due process standards. In the other circuits a clear majority was emerging holding that private hospitals were not required to meet such standards. (Appendix A) The cases cited by petitioner in the current petition which are not included in the earlier petition reveal that the circuits have continued to resolve the issue against the peitioner. All the new cases cited by petitioner in support of their argument are federal district court cases. Two

out of three of these cases, Large v. Reynolds, 414 F Supp 45 (WD Va 1976) and Poe v. Charlotte Memorial Hospital, Inc., 374 F Supp 1302 (WD NC 1974) are cases in the Fourth Circuit.

Petitioner lists several new cases in which the courts have held that private hospital acts do not amount to state actions. Two of these cases, Briscoe v. Bock, 540 F2d 392 (8th Cir 1976) and Schlein v. Milford Hospital, 561 F2d 427 (2nd Cir 1977) are Court of Appeals cases. Three district court cases holding that private hospitals are not subject to due process requirements are also listed by the petitioner. Johnson v. Southwest Detroit Community Mental, Etc., 462 F Supp 166 (ED Mich 1978); Doyle v. Unicare Health Serv. Inc. Aurora Center, 399 F Supp 69 (ND Ill 1975); Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F Supp 1020 (SD NY 1971). Thus, an analysis of the cases cited in the petition itself show that since the court denied

certiorari in the former petition the circuits have continued to resolve this issue against finding private hospitals responsible for due process requirements. The previous split among the circuits on the issue appears to be resolving itself and there is no compelling need for this court to consider the question.

3. Even if a private hospital is required to meet due process standards, such standards were met in this case.

Since the Supreme Court of Oregon in this case decided that due process standards were not required, it did not reach the issue of whether the hospital procedures conformed to such standards. However, the court did deal with the issue of whether "common law due process" had been met by the hospital's procedures. The court answers each of plaintiff's contentions about lack of due process as follows:

"Plaintiff contends he was not permitted to show bias and prejudice of witnesses. In fact he was allowed the usual means, which is cross-examination. He contends he was not given a concise statement of the charges against him. He was given information of specific circumstances that occurred in connection with the making of particular hospital records from which records he could have determined all necessary information. He secured as much or more information about the charges than he would have received from the average criminal indictment. He made no request for the relevant hospital records but proceeded to hearing.

"Plaintiff contends he did not have an opportunity to call witnesses because defendant did not require the attendance of the witnesses he wished to examine. Defendant did not have subpoena power and, of course, could not require anyone's attendance. There is evidence that persons whom plaintiff requested to appear asked representatives of the defendant whether they had to appear and were told, truthfully, they did not have to; but there is no evidence that defendant discouraged or dissuaded anyone who was so inclined from appearing and testifying. In fact, some persons did appear and testify in plaintiff's behalf.

"Plaintiff complains that the committees before which the hearings were held were not impartial and

that they considered information outside of the record. * * * However, we agree with the trial judge that plaintiff did not carry the burden of proving that the members pre-judged the charges against him or that the proceeding was basically unfair.

"Plaintiff charges that the bylaws and regulations of summary suspension were vague and overbroad and were not followed. * * * It is our conclusion that the bylaws were substantially complied with and that the standard, 'in the best interests of patient care,' is as definite as was practical. * * *"

"Plaintiff contends that he was given no opportunity by the bylaws or in fact to be heard in advance of the summary suspension order. It is true the bylaws do not provide for any such hearing nor was he given one. Assuming that plaintiff is entitled to 'fair procedure' under a common law theory, we cannot say that he is entitled to a pre-suspension hearing when the best interest of the patients may indicate to the contrary." (Petition A-7 to A-9).

Thus, the Oregon Supreme Court essentially held that if plaintiff had any procedural rights they were adequately met by the

hearings he was afforded by the hospital.

CONCLUSION

The Supreme Court has twice denied certiorari in cases involving the identical issue presented by the present case. Greco v. Orange Memorial Hospital Corporation, 423 US 1000, 96 S Ct 433, 46 L Ed 2nd 376 (1975). Straube v. Larson, et al, 74-3496, 74-3497, (9th Cir 1976), petition for certiorari denied, 429 US 830, 97 S Ct 91, 50 L Ed 94, 1976. One of the cases in which the court denied certiorari was based on the same fact situation as that presented by the instant case. The law cited by the petitioners establishes that all circuits except the Fourth Circuit have continued to hold that a private hospital is not responsible for meeting due process standards.

In addition, the conclusion of the Oregon Supreme Court that procedural

requirements were met in this case, illustrates that even if the hospitals were required to meet due process standards, such standards were met under the facts of the case. No compelling need exists for the court to consider the question presented in this case.

Respectfully submitted,

LANG, KLEIN, WOLF, SMITH,
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William L. Hallmark

APPENDIX A

Response to Petition for Certiorari filed in answer to previous petition on same facts in Kurt R. Straube, M.D. v. Roger G. Larson and Emanuel Lutheran Charity Board, a corporation, dba Emanuel Hospital, No. 75-1795.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1795

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

See Inside Cover for Counsel

Appendix A

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July 1, 1976

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STATUTES AND CONSTITUTION

42 U.S.C. § 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Roger G. Larson, Emanuel Lutheran Charity Board, Robert Seapy, M.D., and Richard K. Helm, M.D., respectfully urge the Court to deny Petitioner's request for a Writ of Certiorari in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but is attached to the Petition as Exhibit A. The opinion of the District Court is not reported but is attached to the Petition as Exhibit B.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Whether the existence of governmental contacts with a private institution renders conduct of that institution which is unrelated to the governmental contacts state action subject to Constitutional regulation.

STATUTE INVOLVED

42 U.S.C. § 1983 is set forth in the

Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reflects the allegations of his Complaint upon which the opinions below were based and the procedural history of this litigation.

REASONS FOR DENYING THE WRIT

The question presented in this case was resolved by this Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which stated that where governmental contacts with a private institution were not so pervasive as to make that institution lose its essentially private character, there must be a nexus between the governmental contacts alleged and the conduct complained of before that conduct can fairly be characterized as state action. Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. Plaintiff relied on the liquor licensing provisions of Pennsylvania law. This Court held that the practice of racial

discrimination was not state action, even though the club was subject to extensive government regulation by virtue of its liquor license. "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 176 - 177.

Numerous attempts have been made to label any action of a purely private hospital state action by virtue of the fact that the hospital receives Federal funds under the Hill-Burton Act and has other incidental governmental contact. The United States Courts of Appeals for the Second, Fifth, Seventh, Ninth and Tenth Circuits have each held that the actions of a private, non-profit hospital do not constitute state action merely by reason of the hospital's receipt of Hill-Burton funds, tax advantages or other incidental governmental

contacts absent some connection between the governmental contacts and the action complained of. Barrett v. United Hospital, 376 F.Supp 791 (S.D.N.Y., 1974), aff'd, 506 F.2d 1395 (2nd Cir., 1975), Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (December 2, 1975), Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir., 1973), Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir., 1974), Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

The Eighth Circuit in Klinge v. Lutheran Charities Association, 523 F.2d 56 (8th Cir., 1975), did not decide this question since the Defendant Hospital conceded Plaintiff's position and the Court never had to address it.

The Sixth Circuit's early decisions did ignore the nexus requirement, but, subsequent to this Court's decision in Moose Lodge, that Circuit reversed its position and held that the receipt of Hill-Burton funds alone did not make

conduct of a private hospital state action. Jackson v. Norton Children's Hospitals, Inc., 487 F.2d 502 (6th Cir., 1973).

Plaintiff, in his Petition, asserts that there is a split within the Tenth Circuit because of the early decision of Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir., 1971). In that case, the hospital did not challenge Plaintiff physician's assertion that its conduct amounted to state action. In Ward v. St. Anthony Hospital, supra, the Court restated its long-standing rule that "the claimed involvement must be associated with the challenged activity" and held that since there existed no nexus between the governmental contacts alleged and the medical staff decisions of St. Anthony Hospital, such decisions were not state action. 476 F.2d at 675.

Thus, only the Fourth Circuit has consistently ruled that receipt of Hill-Burton funds alone transforms the conduct of a private hospital into that of a state agency.

CONCLUSION

A clear majority is emerging among the Circuits applying the nexus requirement outlined by this Court in the Moose Lodge decision with regard to the conduct of private hospitals receiving government funds. The split among the Circuits appears to be resolving itself and there is no compelling need for this Court to consider the question.

Respectfully submitted,

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By: _____
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I hereby certify that I served the foregoing Response to the Petition for a Writ of Certiorari to the United States Supreme Court on the following:

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attorneys for Plaintiff-Petitioner on the ____ day of March, 1980, by mailing to them a true and correct copy thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes, addressed to said attorneys at their regular office address, or their address as last given by them on a document which they have filed in the above-entitled cause and served on me; said sealed envelopes were then deposited in the United States post office at Portland, Oregon, on the day last above mentioned, with the postage thereon fully paid.

William L. Hallmark